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Cancellation and
substitution

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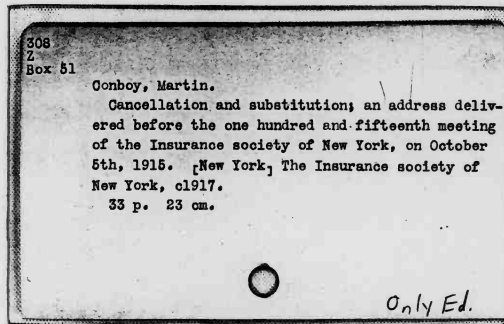
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Cancellation and Substitution

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DELIVERED BEFORE THE ONE HUNDRED AND
FIFTEENTH MEETING OF

The Insurance Society of New York

ON

October 5th, 1915

BY

Mr. Martin Conboy

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117
1891, 12 N. Y. Ins. 25-17

Cancellation and Substitution

The meaning of the cancellation clause of the New York Standard Fire Policy, and the extent of the authority of agents and brokers as mediums by or through whom cancellation and substitution may be effected.

The cancellation clause of the New York Standard Fire policy (lines 51-55) is as follows: Language of policy.

"This policy shall be cancelled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is cancelled by this company by giving notice it shall retain only the *pro rata* premium."

While the general title of this address is "Cancellation and Substitution," the subject, for reasons more particularly of interest to this body, will be considered under two main heads, viz: (first) the interpretation of the cancellation clause, or more properly what must be done under the cancellation clause to effect cancellation, and (second) the knowledge and authority of agents and brokers in relation to a determination of whether cancellation and substitution have been effected.

Before passing to the question of authority of agents and brokers we shall, therefore, consider how the cancellation clause has been construed by the courts and what has been held to be necessary to a valid cancellation thereunder.

¹ 83 Hun. 614 and 152 N. Y., 635.

I.

INTERPRETATION OF THE CANCELLATION CLAUSE.

Unearned premium must accompany notice of cancellation.

The phrase that has caused the most contention, the last one, "except that when this policy is cancelled by this company by giving notice it shall retain only the *pro rata* premium," taken by itself seems to indicate that when the policy is cancelled, that is at the very moment of cancellation, inasmuch as only the *pro rata* premium may be retained, all the rest of the premium must be returned. This is merely an application to the summary process of cancellation, permissible under the policy, of the ordinary equitable doctrine, relating to cancellation of any instrument, that unearned benefits thereunder must be returned. It is only equitable, that a return of the unearned premium should be a condition precedent to cancellation. If the return of the unearned premium had been enjoined upon the insurance company without such act being made a condition of valid cancellation, it would be possible for the company to deprive the policy holder of his insurance leaving him only a law suit for his premium.

When the preceding portion of the clause is read, however, some reason appears for the contrary point of view. The unearned premium is to be returned on the *surrender of the policy*, and the sentence in which this direction is contained is quite distinct from that describing the method of cancellation. Such is the argument of Chief Judge Parker in an able dissenting opinion in the leading case, *Tisdell v. New Hampshire Fire Ins. Co.*, 155 N. Y., 163.

That a return of the unearned premium is a condition precedent to cancellation was decided by Judge Bartlett at the trial of the earlier case of *Nitsch v. American Central Ins. Co.* The decision, affirmed both at general term and in the court of appeals, without opinion, appears no where in the reports.² For a time the Appellate Division held that an offer to refund the unearned premium was sufficient to meet the requirement³ but in the *Tisdell* case, the Court of Appeals, following some earlier cases upon explicit clauses in policies⁴ decided that an actual repayment or tender was necessary, and the law is well settled now that a fire

² For Judge Bartlett's reasoning see the quotation in note to *Davidson v. Germania Ins. Co.*, 13 L. R. A., N. S., 884.

³ *Waltheer v. Pennsylvania F. Ins. Co.*, 2 App. Div. 228; *Backus v. Exchange F. Ins. Co.*, 26 App. Div. 81.

⁴ *Van Valkenburgh v. Lenox Fire Ins. Co.*, 61 N. Y., 465; *Griffey v. New York Central Ins. Co.*, 100 N. Y., 417.

insurance company defending an action on a policy upon the ground that it had cancelled the same must show that its notice of cancellation was accompanied by an actual tender of the unearned portion of the premium paid.⁵

The majority opinion in the *Tisdell* case represents the weight of authority⁶ although Judge Parker's views have prevailed in the federal courts,⁷ in New Jersey, and in some other jurisdictions.⁸

There is a suggestion by Judge Vann of the New York Court of Appeals, in a dissenting opinion in another case⁹ that a surrender of policy is necessary to a cancellation by the insured apparently on the ground that a return of the unearned premium is necessary to cancellation.

This would seem, however, to be applying the rule in the *Tisdell* case beyond its reason for the phrase upon which that case is founded applies only to cancellation by the company.

In a Virginia case,¹⁰ the agents of the cancelling company had made urgent and repeated efforts to obtain from the insured payment of premiums that they had remitted to the company and eventually served a cancellation notice covering certain policies, one of which was involved in the suit. The notice concluded as follows:

"On the four policies mentioned in this notice, no part of the premiums has ever been paid, and the premiums earned for the time they have been in force, including costs of protest of drafts, &c., amounts to \$36.28.

⁶ *C. A. Smith Lumber Co. v. Colonial Assurance Co.*, 172 App. Div. 140.
⁷ *German Union Fire Ins. Co. v. Clarke*, 118 Md., 222; 82 Atl. 974; *Harford Fire Ins. Co. v. Tewes*, 132 Ill. App. 351; *Christman & S. Bldg. Co. v. Hartford Ins. Co.*, 73 Mo. App. 210; *Acema Ins. Co. v. McGuire*, 61 Ill. 342; *Phoenix Assurance Co. v. Manner Improved Cotton Machine Mfg. Co.*, 82 Tex. 227; *Philadelphia Liven Co. v. Manhattan F. Ins. Co.*, 8 Pa. Dist. Ct. 261. See *Taylor v. Insurance Co. of North America*, 160 Pac. (Okla.) 564 for a review of the authorities.
⁸ *Schwarzchild & Sulzberger Co. v. Phoenix Ins. Co.*, 124 Fed. 52; *El Paso Reduction Co. v. Hartford Fire Ins. Co.*, 121 Fed. 939; see also *Chadbourne v. German-American Ins. Co.*, 31 Fed. 323.
⁹ *Davidson v. German Ins. Co.*, 13 L. R. A. (N. S.) 884; 65 Atl. 266, where an elaborate footnote will be found; *Wells v. Granite State Fire Ins. Co.*, 129 N. W. 19 (Mich.).

¹⁰ "Whether the insurer or the insured is the actor in the attempt to cancel, cancellation is not complete until the unearned premium is returned. (*Tisdell v. New Hampshire Fire Ins. Co.*, 155 N. Y., 163, 165). If the insured is the actor, the surrender of the policy and the return of the premium are concurrent acts. If the insurer is the actor, the notice and the return of the premium are sufficient for the insured might be unwilling to surrender the policy." Vann, J., dissenting in *Buckley v. Citizens Ins. Co.*, 188 N. Y., 309, at 406.
 The cases where cancellation is at the instance of the insured seem all to be confused with a cancellation by mutual consent. It seems a curious doctrine to compel the insured to secure the unearned premium from the company before he can cancel. See *Ragley Lumber Co. v. Insurance Company of North America*, 94 S. W. 185; 47 Tex. App. 511; *Stevenson v. Sun Insurance Office*, 119 Pac. 829 (Cal. App.). The case of *Farmers Mut. Ins. Co. v. Phoenix Ins. Co. of Brooklyn*, 90 N. W. 1000; 45 Neb., 14 reversed (on the point in question reaffirmed) in 95 N. W. 5; 65 Neb. 14, is distinguished on the ground that the recovery of unearned premiums was what was there involved.

¹¹ *Hamburg-Bremen Fire Ins. Co. v. Browning*, 48 S. E. 2.

"The return premiums on the three policies last named amount to \$43.08, of this we apply \$36.28 to the premiums due on the first four policies, leaving balance of \$6.80 to be paid you on return of the policies. Please return all of the policies without delay."

This notice was sent and received in August. The insured treated it with silence and proceeded to reinsure part of the properties covered by the cancelled policies in other companies. In the following February there was a fire, and claim was made on the cancelled policies, it being contended that the notice of cancellation was insufficient, because the unearned premium was not returned.

There were two recoveries in favor of the insured, both reversed, and in the report to which I have referred, the Supreme Court of Appeals of Virginia, without the citation of a single authority, disposed of the contention made by the insured by applying the \$6.80 of unearned premiums to the satisfaction of premiums on the policy during the period between notice of cancellation and the occurrence of the fire at the rate of \$2.55 per month, thus wiping out the margin of premium and effecting a cancellation *eo instanti* by what might not inaptly be termed a legal *tour de force*. The conclusion is thus stated:

"The fire did not occur for more than six months after the cancellation notice, at which time the policy sued on had long since elapsed by the non-payment of premiums."

There is nothing in the language of the standard policy that requires the company to tender, as a condition of cancellation, the amount due on any intervening liability.¹¹ In the absence of any provision making payment of intervening liability a condition precedent to cancellation of the policy and in view of the express requirement for payment of the unearned portion of the premium, the conclusion would seem to follow that in order to effect a cancellation a tender of the amount of intervening liability either in full or as reduced by the earned portion of the premium is unnecessary. Another reason for this conclusion is that the loss which the company is required to pay is no part of

Tender of intervening liability unnecessary.

11 A dictum in *American Employers & Ins. Co. v. Fordyce*, 62 Ark. 569, seems opposed to the text, but does not change the writer's opinion. It is as follows: "If the entire premium had been paid and no liability had accrued between the time of the execution of the policy and the time of cancellation the insurer might have cancelled the policy under certain conditions therein contained by refunding the premium less the pro rata portion thereof for the time the policy was in force. If in the meantime, a liability had accrued cancellation without the assent of assured could only take place by refunding the premium, less the pro rata for the time the policy had been in force, and also by the payment of intervening liabilities."

the benefit that it obtains from the insured and which under the equitable doctrine referred to at the outset, as well as under the explicit determination of the courts of this state, must be returned to the extent that it is unearned.

The notice of cancellation must state unconditionally the determination of the company to cancel at a specific time.¹² A notice by the agent that the company "will cancel the policy I sent you," is insufficient.¹³ If, however, it is clear from the language of the notice that the company wishes to terminate its liability and fixes the time of termination, the notice is sufficient. Thus, a notice expressing a "desire to terminate liability" and stating that the policy "will be cancelled on our books on the 14th inst., five days from date" has been held to suffice.¹⁴

Form of notice of cancellation.

The manner of giving notice has thus been defined by an able federal judge:

Manner of giving notice.

"Our conclusion is that under the provision of an insurance policy that it may be cancelled by the insurer by giving notice of cancellation and tendering a ratable proportion of the premium to the insured mailing the notice, or a copy of it, and the return premium in a letter postpaid and addressed to the insured at its post office address, or delivering a copy of the notice and the return premium to an agent of the insured in charge of its office and business are sufficient to effect the cancellation, where the insured is a foreign corporation and all its officers are absent from the state in which its office, its principal place of business, and the property insured are situated."¹⁵

The directions of the cancellation clause should be strictly complied with.¹⁶ A tender of another policy for a part of the insurance with the balance of the unearned premium in money is not sufficient tender in states following the *Tisdell* case.¹⁶

Form of tender of unearned premium.

12 "No particular form of notice is prescribed. It is only necessary that the company positively, distinctly, and unequivocally indicate to the insured that it is its intention that the policy shall cease to be binding as such upon the expiration of five days from the time when this information is made known to the insured; and it does not matter whether this information is conveyed by the use of the words 'Your policy will be canceled in five days,' or 'Your policy is already canceled.'"

Davidson v. German Ins. Co., 13 L. R. A. (N. S.), 839.

13 *Gardner v. Standard Ins. Co.*, 58 Mo. App. 611; *Christman & Sawyer Bkg. Co. v. Hartford Ins. Co.*, 75 Mo. App. 310; *McNellis v. Acta Ins. Co.*, 178 Ill. App. 576.

14 "Where the notice to a mortgagee was signed by an agent without showing for whom he was acting, was dated in a different town from that in which the property was situated and the name of the mortgagee was so blurred as to be illegible, it was held insufficient."

State Ins. Co. of Des Moines, Iowa v. Title, 85 N. W. 473; 1 Neb. (anno 7) 191.

15 *Bergson v. Builders Ins. Co.*, 38 Cal. 541; *Relston v. Royal Ins. Co.*, 140 Pac. 552; *American Glove Co. v. Pennsylvania Ins. Co.*, 113 Pac. 681; 15 Cal. App. 77.

16 *Sanborn, J.*, in *Liverpool, London & Globe Ins. Co. v. Harding*, 201 Fed. 515.

17 *Scheel v. German American Ins. Co.*, 76 Atl. 507; *Northern Pine Crating Co. v. Liverpool, London & Globe Ins. Co.*, 143 W. 42.

18 *Quong Tze Sing v. Anglo-Nevada Assurance Corp.* (Cal.) 10 L. R. A. 144.

When notice
takes effect.

Notice of cancellation takes effect only from its receipt.¹⁷ Thus where a notice of cancellation sent by an insurance company was contained in an envelope which bore in its corner the name of the company's agents but coupled not with the name of the insuring company but that of another company, for which they were also agents, and the envelope thus marked was received but laid aside unopened, it was held that there was not sufficient notice, the actual notice not having been seen by the addressee before the fire and the envelope not being so marked as to give him warning.¹⁸ Thus also, where a registered letter was received in the post office in the town of the assured's residence more than five days before the fire and two successive notices that such a letter had been received were placed in the assured's letter box, the assured was held not to have sufficient notice because he did not actually receive the letter within five days of the fire.¹⁹

Under this topic belongs also a curious case which recently arose in Alabama.²⁰ The policy in that case contained the provision that "notice of cancellation deposited in the United States mail postage prepaid, to the address of the assured, as stated herein, shall be sufficient notice, and the check of the company or its duly authorized agent similarly mailed a sufficient tender of any unearned premium." The notice of cancellation with check enclosed was sent by the company to the insured by registered mail, a direction being put upon the envelope to return if undelivered within five days. But for such a direction the postmaster would have been justified under the postal regulations in retaining it for any period under three months, if he thought by so doing he might deliver it. The addressee, the insured, was out of town when the letter arrived and as he did not return for more than five days thereafter, he never received the notice, it being returned to the company pursuant to instructions. The court held that this was not effective notice of cancellation.

How time
computed and
when notice
takes effect.

The time is not computed from the precise moment of receipt nor from noon of the day thereof, even though the insurance runs from noon to noon, but the time provided for in the cancellation clause, as is the case with time provisions in all

17 *Crown Point Iron Works v. Aetna Ins. Co.*, 127 N. Y. 698; *Davidson v. Germania* supra; *Mullen v. Dorchester Mut. F. Ins. Co.*, 122 Mass. 171; *Farum v. Phoenix Ins. Co.*, 83 Cal. 246; *Hartford Ins. Co. v. Tewes*, 132 Ill. App. 221.
18 *Fritz v. Pennsylvania Fire Ins. Co.* (N. J.) 88 Atl. 1065; 69 L. R. A. (N. S.) 85.
19 *Potomac Ins. Co. v. Atwood*, 118 Ill. App. 349.
20 *American Automobile Ins. Co. v. Watts*, 67 So. 758.

collateral matters connected with the insurance policy, is computed according to the general legal rule "of excluding the first day and counting the days as legal days beginning and ending at midnight."²¹

It seems to be the law in Maryland that a notice, although stating that five days notice is given, which specifies a date upon which the cancellation is to take effect and which fails to reach the insured five days or more before the time specified, not only is ineffective in cancelling the policy at the date intended but is utterly ineffective to cancel the policy at any time.²² This seems to be because in that state the cancellation of the insurance company on its books of the insurance is necessary.²³ According to the general weight of authority no act on the part of the company other than giving notice and making proper payment is necessary to cancellation,²⁴ while a notice which specifies a particular time when cancellation shall become effective, although it will not affect a cancellation until five days after its receipt is not invalid though received within that time of the day which is specified.²⁵

Notice to ex-
clude Sun-
day.

The question of the inclusion or exclusion of Sunday from the five days given in the Standard Fire policy after notice of cancellation either as regards an intervening Sunday or a Sunday upon which the five days begin or end does not seem to have arisen in any adjudged case in this country. Cases involving similar questions in regard to other periods of time are so common that it is extremely doubtful whether a case precisely in point from a foreign jurisdiction would have any particular force as settling a question of insurance law. The question would quite as probably be settled by the past decisions of the particular jurisdiction on the general subject of the reckoning of time.

Since the general rule of computation of time, which has been held to apply to the computation of time preceding effective cancellation, excludes the day from which computation is made, no question is raised if the notice of cancellation reaches the insured on a Sunday. Thus, when the day on which an assessment upon a life policy fell due was Sunday and thirty days of

21 *Pennsylvania Plate Glass Co. v. Spring Garden Ins. Co.*, 189 Pa. 265; 42 Atl. 138. (N. S.) 529.
22 *German Union Fire Ins. Co. v. Clarke*, 116 Md. 622; 82 Atl. 574; 39 L. R. A. (N. S.) 529.

23 *American Fire Ins. Co. v. Brooks*, 83 Md. 22.

24 *Bergeson v. Builders Ins. Co.*, 38 Cal. 541.

25 *Fritz v. Pennsylvania Fire Ins. Co.* (N. J.) supra; *American Glove Co. v. Philadelphia Fire Ins. Co.*, 15 Cal. App. 77; *Philadelphia Linen Co. v. Manhattan Fire Ins. Co.*, 8 Pa. Dist. Ct. 281; *Emmott v. Slater Mut. F. Ins. Co.*, 7 R. I. 562; *Commercial Union Fire Ins. Co. v. King*, 156 S. W., 445; *Ralston v. Royal Ins. Co.*, 140 Pac. 552.

grace were given the thirty days began to run at midnight of Sunday.²⁶

Where the last of the five days falls upon Sunday we are, however, confronted by a different problem, the solution of which depends in great measure upon whether the Standard Fire policy is to be governed by the rules of construction applying to statutes of this State. If such were the case, not only would the specific provisions of the *General Construction Law*²⁷ be applicable in this jurisdiction but the distinction on this point, which is quite widely recognized, between the computation of contract and statute time would come into operation. It seems pretty definitely settled, however, that the provisions of the policy although prescribed by the legislature are to be construed by the ordinary rules of contract construction.

"The object of the New York statute is declared to be to provide a uniform contract or policy of fire insurance—not to prescribe terms which should seem to the legislature reasonable. When the act was passed, the form of policy had not yet been adopted. Its preparation was left to insurance men, to wit, the New York Board of Fire Underwriters, and by section 3 of the act it is provided that any policy made in terms inconsistent with the provisions of the act shall nevertheless be binding upon the company."²⁸

So it was said with regard to the arbitration provision of the Massachusetts Standard policy.²⁹

"It is argued for the defendant, that the provision may have more effect to bar the plaintiff's action if construed as a statute than if regarded merely as a contract. If the Legislature prescribes and annexes to a particular right a special remedy a party is confined to that remedy. *Boytton v. Middlesex Ins. Co.*, 4 Met. 212. But this provision is not in form a legislative enactment. It is put forward by the Legislature as a contract to be entered into by the parties, and to derive its validity from their consent. It is their contract; as such it does not deprive the plaintiff of his action and his trial by jury; it is not to be presumed that the Legislature intended by prescribing the form of contract, and prohibiting any other to give it effect in depriving a party of rights which as a contract it would not have."

A further reason is that the terms of the standard policies were used prior to their adoption by the legislature in insurance contracts and "It is to be assumed that these terms were used in

²⁶ *Aetna Life Ins. Co. v. Wimberly*, 23 L. R. A. (N. S.) 729; 119 S. W. 856.

²⁷ Section 20.

²⁸ *Richards on Insurance*, (2nd ed.) 33.

²⁹ *Reed v. Washington Ins. Co.*, 138 Mass. 572.

this policy in the sense in which they were previously used and defined."³⁰

If in accordance with the foregoing authorities we assume that the Standard Fire Insurance policy is to be interpreted by the ordinary rules of contract construction, we may rely upon a great weight of authority³¹ to the effect that the period will not expire until Monday night. It is noticeable, however, that this rule is usually based on the ground that performance of a contract upon Sunday would be against law or invalid.

"Such being the case, the assured was under no obligation to do what would have been not only an illegal act but also one which the other party was not bound to recognize. In this view of the case there was no such default on the part of the assured in not paying the premium fully due on the 1st of October as should be held to terminate the policy."³²

Similarly the principal case against the foregoing proposition³³ is based upon the assertion that the performance of a contract on Sunday would be both lawful and valid.

Although in the instance we are considering the contract does not require any act to be done on the final day and therefore may seem to differ from the ordinary case it would appear that the general rule would apply, first, as was remarked in a New Jersey case,³⁴ "So to hold is to put this case in accord with the great weight of authority and is consistent with the well settled rule that so far as fair construction of the language used will permit, the conditions and provisions of a policy with reference to forfeiture should be strictly construed in favor of the insured and against the company;" second, because the point is so comparatively trivial that public convenience would seem to require a uniform rule rather than one based upon nice reasoning in each case; and third because the object for which the five days' notice is given in an insurance policy is to allow the insured to obtain

³⁰ *John Davis & Co. v. Insurance Co. of North America*, 115 Mich. 332; see also to the same effect *Kollitz v. Equitable Trust Fire Ins. Co.*, 99 N. W. 892; *Calchester v. N. H. Fire Ins. Co.*, 74 Conn. 349; 51 Atl. 566.

³¹ *The Harbinger*, 50 Fed. 941; *Striker v. Vanderbilt*, 27 N. J. L., 68; *Salter v. Burt*, 20 Wend. 206; *Avery v. Stewart*, 2 Conn. 69; *Campbell v. International Life Assurance Soc.*, 4 Bosw. 286; (this case and that of *Amis v. Kyle* (infra) contain elaborate histories of Sabbath observance); *Barrett v. Allen*, 10 Ohio (2d) 335; *Ballew v. Bridgeport Wood Furnishing Co.*, 62 Ill. App. 663; *Post v. Garrow*, 18 Neb. 685; 25 N. W. 289; *Warne v. Wagoner*, 15 Atl. 201; *Porter v. Pierce*, 120 N. Y. 217.

³² *Hammond v. American Mutual Life Ins. Co.*, 10 Gray, 206.

³³ *Amis v. Kyle*, 2 Verg. 31; see also *Mingus v. Britchet*, 14 N. C. 78; *Kilgour v. Miles*, 6 Gill & J. 208.

³⁴ *Bobles v. Prudential Ins. Co.*, 86 Atl. 428.

a new insurance policy in another company, which would be practically difficult on Sunday.³⁵

The last reason would apply equally well to Sunday occurring between the first and last of the five days as to one falling upon the last day. Upon this point, however, the authorities are by no means so clear. The rule is laid down by a considerable number of cases, notably in Michigan and Massachusetts that

"when a statute fixes a limitation of time within which a particular act may or may not be done if the time limited exceeds a week, Sunday is included in the computation; but if it is less than a week, Sunday is excluded." This is the established rule of interpretation in this state.³⁶

The cases supporting this view that have been examined have been without exception cases of statute,³⁷ and the commentator to the anonymous case in 2 Hill (N. Y.) 375 makes the assertion that the rule is confined to statutory interpretation. No reason appears for this distinction, however. The cases against the foregoing rule are quite numerous,³⁸ and one at least applies the rule which it lays down as well to contracts as to statutes.³⁹

Bearing in mind the object of the five days provision and the difficulty of securing insurance on Sunday, it would seem that the following reasoning of Lord Chief Justice Ellenborough would be peculiarly applicable to the situation in question:⁴⁰

"Lord Ellenborough, C. J. The object of the rule is, that the bail should have four days allowed them to search the office that they may know whether it be necessary to render their principal or not. That being so and Sunday not being a day on which any search can be made the bail would, if Sunday were reckoned as one of the days only have three entire days during which they could search the

³⁵ *Bard v. Firemen's Ins. Co.*, 198 Me. 295; 81 Atl. 570; *Rosen v. German Alliance*, 106 Me. 229; 76 Atl. 688; *Hartford Fire Ins. Co. v. Tewes*, 152 Ill. App. 521; *Continental Ins. Co. v. Donell*, 25 Ky. Law Rep. 1201.

³⁶ *Cunningham v. Mahon*, 112 Mass. 38.

³⁷ *Hannum v. Tourtellot*, 10 Allen 494; *Tuttle v. Boston*, 215 Mass. 57; *Haley v. Young*, 184 Mass. 264; *Cowley v. McLaughlin*, 111 Mass. 131; *Campbell v. Cook*, 92 Mich. 626; *Fellner v. Mercantile F. & M. Ins. Co.*, 110 La. 952; *Thayer v. Felt*, 4 Pick. 254; *Craig v. U. S. Accident & Health Co.*, 61 S. E. 422 (S. C.); *Minor v. McDonald*, 10 S. W. 421; *Snell v. Scott*, 2 Mich. N. P. Thomas, 26 N. H. 202; *Tuttle v. Gates*, 24 Me. 382; *Whipple v. Williams*, 4 How. Pr. 17; *State ex rel. State Pharmaceutical Assn. v. Michel*, 52 La. Ann. 292; 24 L. R. A. 233; in New York the case of *Whipple v. Williams* is disapproved in *Taylor v. Corbiers*, 8 How. Pr. 383.

³⁸ *Cressey v. Parks*, 70 Me. 357; 40 Am. Rev. 495; *German Savings Bank v. Cady*, 114 Ill. 231; *Anderson v. Baughmen*, 8 Mich. 298; *Corey v. Hildner*, 19 Mich. 214; *State v. Green*, 60 Cal. 631; *Ketch v. Ry. Co.*, 36 N. Car. 346; *Payton v. State*, 25 Tex. Crim. 598; *Ober v. Sterr*, 28 Gr. Ct. Rep. (Ohio) 225; *Adams v. State*, 35 Tex. Crim. 285; *Martin v. Sunset Tel. & Tel. Co.*, 15 Wash. 200.

³⁹ *Hovies v. Brazer*, 39 Va. 495.

⁴⁰ *Howard v. Smith*, 1 Barn. & Ald. 528.

office. I am therefore of opinion that the ca. sa. should have lain in the office four entire days exclusive of the Sunday; and consequently that the proceedings are irregular."

An insurance policy may be cancelled by agreement between the parties and the right to five days notice or the return of the unearned premium may be waived. A surrender of the policy by the insured to the company will be generally held to be such waiver,⁴¹ not, however, if it appear that the insured was ignorant of his rights.⁴² A formal surrender of the policy is, however, only important as evidence of such an agreement and cancellation may be made immediately without return of premium or surrender of the policy if there is a meeting of the minds of the parties to that effect.⁴³ "The requirements of the policy as to the cancellation by the insurance company are inserted for the benefit of the assured, and may be waived by him."⁴⁴ It must, of course, appear that the act upon which the alleged waiver depends was authorized by the party to be bound thereby.⁴⁵

⁴¹ *Buckley v. Citizens Ins. Co.*, 188 N. Y. 289; *Gorge Hotel v. Liverpool, London & Globe Ins. Co.*, 132 App. Div. 182; *Kelley v. Aetna Ins. Co.*, 94 S. E. 502.

⁴² *Rosen v. German Alliance Ins. Co.*, 76 Atl. 688; *Brage v. Royal Ins. Co.*, 98 Atl. 622.

⁴³ *Hillock v. Traders Ins. Co.*, 54 Mich. 532 (opinion by Cooley, C. J.); *Cox v. Farmers Mut. F. Ins. Co.*, 128 Ga. 375; see *Home Ins. Co. v. Chattahoochee Lumber Co.*, 126 Ga. 284.

⁴⁴ *Hancock v. Hartford Fire Ins. Co.*, 81 Misc. (N. Y.) 159, 163.

⁴⁵ *Northern Fire Rating Co. v. Liverpool, London & Globe*, 143 Wis. 423.

The following questions from a very recent case in Pennsylvania indicate further complications that may arise out of the surrender of policies by the insured to the insurer and the possible interpretation of the act as a waiver.

"The agent's version of the affair is that he was directed by the company to cancel the policy, that he went to the insured and without indicating for which company he was acting, told him that he had to reduce the time of insurance held by him and that the insured, the plaintiff, told him that he would give him all the policies and that he should select the one that he wanted."

"Taking the agent's story, plaintiff's direction to him was merely a permission to the agent to make his, the agent's, selection of a policy for cancellation. It may well be argued, that the act of cancellation was the act of the company through the agent, and that the plaintiff's action was a waiver relation to any particular policy constitutes no waiver of the provision of the company requiring notice of cancellation."

"The account of the transaction as given by the plaintiff differs very materially from the above. He asserts that the agent told him one of the policies to be cancelled but the agent could not recall which, but thought he could tell if he saw them all, that the plaintiff then gave him all the policies and asked him to keep them in his safe. The policy in question required five days' notice of cancellation. Of course, if the plaintiff's story was believed by the jury there could be but one result and that would be a verdict in his favor."

"A contract for insurance providing for notice cannot be cancelled without it. Where a policy has been delivered by the insured to the local agent at his request and the condition as to this delivery is disputed as to whether it was so surrendered for cancellation or correction the treatment of the policy raises a disputed fact which is properly for the jury. *Mauk v. Commercial Union Assn. Co.*, 7 Pa. Super. Ct. 653."

Davis v. Continental Ins. Co., 60 Pa. Super. Ct. 241.

Strict compliance may be waived of provisions as to cancellation.

To whom notice must be given, and herein of the right of mortgagees, etc. to notice.

"In determining to whom notice must be given, the general principle is that the notice must be given to the person upon whom rests the obligation to pay the premium."⁴⁶

This notice to the party responsible for premiums is not, however, always sufficient. A mortgagee is entitled to the same notice upon cancellation by the company as the insured himself would be and this is true independently of the mortgagee clause if the policy provide that the loss is payable to the mortgagee.⁴⁷

It has been held under the Maine Standard policy, and the same reasoning would apply to the New York policy, that the mortgagor may not cancel the insurance as regards the mortgagee by giving notice to the company, unless he also gives notice to the mortgagee.⁴⁸

So also the consent of the mortgagee of the insured premises to the cancellation of the policy, without the knowledge of the insured, is ineffectual and cannot deprive the latter of his rights.⁴⁹

Since, under the cases, the mortgagee clause constitutes, in addition to the contract with the mortgagor, a separate and independent contract, whereby the mortgagee's interest is insured, notice to the mortgagee of cancellation of the mortgagee clause may be in practice a very effective method of ending liability to the mortgagor, when it is difficult to serve notice on the latter.

The question of the effect of a notice of cancellation sent to the insured upon the interests of parties unnamed in the policy and only included by virtue of such a clause as "on account of whom it may concern," "their own or held by them in trust or on commission" or similar clauses does not seem to have been answered in any cases.

One test for determining whether notice of cancellation must be given to persons other than the person liable for premium is whether such persons were individually contemplated

⁴⁶ Cooley's Briefs on Insurance, p. 2796.

⁴⁷ *Latten v. Royal Ins. Co.*, 6 N. J. L. 432, where the court said: "On the plainest principles of justice, the insurer, under such a stipulation cannot terminate the contract of insurance by withdrawing it before the expiration of the term specified in the contract without notice to the mortgagee."

This was in a case in which the premium had been paid by the mortgagor and no more explicit provision existed in the policy in regard to the mortgagee than "Loss, if any, payable to Fanny Latten and Angelica Latten, mortgagees."

Rawle v. American Central Ins. Co., 77 S. E. 1032; 81 S. C. 299; *Glasscock v. Liverpool, London & Globe Ins. Co.*, 138 S. W. 261 (— App. Tex.).

⁴⁸ *Gilman v. Commonwealth Ins.*, 112 Me. 525; 92 Atl. 731; *L. R. A.* 1915, c. 758.

⁴⁹ *Peterson v. Hartford Fire Ins. Co.*, 87 Ill. App. 567, reversed on question of practice in 187 Ill. 585.

The test to the contrary in 16 Am. & Eng. Engr. of Law (2d Ed.), page 873, for which the case of *Muelier v. San Francisco Ins. Co.*, 187 Pa., 399, is cited as authority, is discussed and declared to be unsound in *Continental Ins. Co. v. Parkes*, 142 Ala. 650, at p. 656.

when the contract was made.⁵⁰ Subject to this qualification, all persons who are by the terms of the policy interested in maintaining it in force should receive such notice.⁵¹

When goods are held in trust it is, of course, lawful for the trustee to insure them in his own name and he may recover for the entire value holding the excess over his own interest in them for the benefit of those who have entrusted the goods to him.⁵² Under such circumstances it would seem that notice to the assured would protect the company against the interest of the beneficiaries, because it is inferable that he is their agent to insure and keep insured and, therefore, to receive notice of cancellation.

The force of this argument lies in the difference between such an insurance and that under a mortgagee clause. It is believed that this view is not controverted by the case of *Utica Canning Company against Home Insurance Company*.⁵³ In that case *Lewis De Groff & Son* were insured by policies containing a commission clause, and when their warehouse burned down there was injured a quantity of beans belonging to the plaintiff. The plaintiff requested *De Groff & Son* to include the value of its beans in the proofs of loss and collect the same from the insurance company for its benefit, but *DeGroff & Son* refused so to do. It later requested *DeGroff & Son* to bring a suit on the policies or permit the plaintiff to sue in their name on the policies, and was again refused. The loss which was not the entire amount of the insurance was paid *De Groff & Son*, and in settlement the latter gave to the insurance company a receipt, attempting the cancellation of the policies. This was on December 30th, 1907. On the 18th of November preceding the plain-

⁵⁰ "Of course, it must be made to appear that the owner was in the intention of the person effecting the insurance when the contract was made (1 *Phillips on Ins.*, p. 189, Sec. 262). Such intention need not have fastened at the time of entering into the contract upon the very person, who, when the contract matures, seeks to take the benefit of it. Otherwise policies to commission merchants, warehousemen, factors and persons in the position of these plainmerchants, would be of little avail. For case *Lewis De Groff & Son* were insured by policies containing a commission clause, and when their warehouse burned down there was injured a quantity of beans belonging to the plaintiff. The plaintiff requested *De Groff & Son* to include the value of its beans in the proofs of loss and collect the same from the insurance company for its benefit, but *DeGroff & Son* refused so to do. It later requested *DeGroff & Son* to bring a suit on the policies or permit the plaintiff to sue in their name on the policies, and was again refused. The loss which was not the entire amount of the insurance was paid *De Groff & Son*, and in settlement the latter gave to the insurance company a receipt, attempting the cancellation of the policies. This was on December 30th, 1907. On the 18th of November preceding the plain-

⁵¹ *Waring v. Indemnity Fire Ins. Co.*, 45 N. Y. 606, 613.

See also, *Hagen v. Scottish Ins. Co.*, 138 U. S. 422.

⁵² *Rawle v. American Central Ins. Co.*, 77 S. E. 1032; 81 S. C. 299; *Glasscock v. Liverpool, London & Globe Ins. Co.*, 138 S. W. 261 (— App. Tex.).

⁵³ *California Ins. Co. v. Union Compress Co.*, 133 U. S. at 499; *Munich Assurance Co. v. Toddwell & Co.*, 128 Fed. 409; *Home Ins. Co. v. Baltimore Warehouse Co.*, 92 U. S. 557; *Symmers v. Carroll*, 149 App. Div. 641.

⁵⁴ 132 App. Div. 429.

tiff had filed its proofs of loss in a suit in its own name against the insurance company and it was allowed to recover. It will be seen from the foregoing facts that the case recognizes the right of the insured under a commission clause to recover the whole amount and the case goes no further than to allow recovery by the bailor in case a bailee wrongfully refuses to sue in his behalf.

A case in Alabama which it is interesting to consider with the foregoing is that of *Snow vs. Carr*.⁵⁴ In that case Snow, a seller of musical instruments and other merchandise, was insured under the commission clause. The fire which destroyed his place of business caused damage exceeding the amount of the insurance to his own property, and also destroyed a piano belonging to the plaintiff, Carr. Snow did not include the cost of the piano in his proofs of loss and refused to share the proceeds of the policy with the plaintiff on the ground that he had the right to satisfy his own claim first. It was held that the plaintiff could recover her proportionate share of the insurance from Snow.

It would seem from the Alabama case that De Groff & Son, the insured in the New York case, might have prevented any recovery by the plaintiff against the insurance company had they made proof of loss for the entire damage to the goods insured, which would have included the plaintiff's beans, and limited the plaintiff's remedy to a suit against themselves. The attempted cancellation was, of course, invalid as to the plaintiff because made by them after loss and after the proofs had been submitted by the plaintiff.

Effect of assignment of policy, when cancellation is attempted.

An assignment of the policy assented to by the company and accompanying a conveyance of the insured property to the assignee constitutes, according to the better authority a novation and gives rise to a new contract between the insurer and the assignee.⁵⁵ Cases in which the policy is assigned after a loss or in which the assignee is merely made the appointee to

⁵⁴ 61 Ala. 383.

⁵⁵ "If, indeed, on a transfer of the estate, the vendor assigns his policy to the purchaser and this is made known to the insurer, and is assented to by him, it constitutes a new and original promise to the assignee, to indemnify him in the manner, whilst he retains an interest in the estate; and the exemption of the insurer from further liability to the vendor, and the premium already paid for insurance for a term not yet expired are a good consideration for such promise and constitute a new and valid contract between the insurer and the assignee. But such undertaking will be binding, not because the policy is in any way incident to the estate, or runs with the land, but in consequence of the new contract. Even the assignment of a chose in action, with the consent of the debtor, and a promise on his part to pay the assignee, constitutes a new contract on which the assignee may sue in his own name."

receive the money upon loss should be carefully distinguished. The usual example of the latter transaction is one in which the policy is assigned as collateral security either by itself or accompanying a mortgage of the property. The holdings in such cases have sometimes thrown doubt on the general principle.⁵⁶

A novation may be analyzed into two constituent contracts, one, to which the insurance company is a stranger, by which the assignor invests the assignee with the right to collect the money when due in his stead; the other, between the assignee and the company, whereby in return for the relinquishment of the claim of the assignee, the insurer enters into a new contract of insurance.⁵⁷ It is evident that without the preliminary assignment the new contract with the insurance company would be without consideration. So it has been held, where there was no contract ever entered into with the assignor that that fact constitutes a defense against the assignee.⁵⁸ As to the result when the policy was procured by misrepresentation of the assignor, the cases are in disagreement.⁵⁹ When the assignor commits a breach of the contract such as leaving the premises unoccupied or allowing them to be encumbered and the violation continues past the time of assignment, the acquiescence by the assignee in the continuance of such cause of forfeiture will be sufficient to forfeit the new contract as against himself.⁶⁰

Where, however, the effect of the assignor's breach has ceased before the assignment, the new contract with the assignee will be considered as a compromise of the assignor's claim. Brewer J. has thus stated the principle.⁶¹

Shaw, C. J. in *Wilson v. Hill*, 3 Met. 96; See also *Ellis v. Insurance Co. of N. A.*, 22 Fed. 646; *Virginia-Carolina Chem. Co. v. Sundry Ins. Cos.*, 108 Fed. 401; *Shenandoah v. Niagara Fire Ins. Co.*, 46 N. Y. 520; *Steen v. Niagara Fire Ins. Co.*, 83 N. Y. 314; *Hooper v. Hudson River Fire Ins. Co.*, 17 N. Y. 421; *City Fire Ins. Co. of Hartford v. Isaac Mark & Co.*, 102; *Kimbrell v. Monarch Ins. Co.*, 70 Ia. 313; *Bayless v. Merchants Town Mutual Ins. Co.*, 106 Mo. App. 681; *Home Mutual Ins. Co. v. Nichols*, 72 S. W. 460; *Bullman v. North British & Mercantile Ins. Co.*, 119 Mass. 318.

The foregoing cases are to the effect that any cause of forfeiture committed prior to the assignment by the assignor will not be a defense against the assignee. The *Ellis* case *supra* is the best on this point. It is by Brewer, J. and covers the whole subject.

⁵⁶ The cases cited in 19 CYC 635 are largely of this kind although certain cases contain passages directly opposed to the doctrine above stated. *Wilson v. Mut. Fire Ins. Co.*, 174 Pa. St. 504. *Reed v. Windsor Co. Mut. Fire Ins. Co.*, 54 Vt. 413. Mr. Richards does not approve of the novation theory (3rd ed.) p. 355, but see J. R. Ames "Novation" 6 Harv. L. Rev. 184.

⁵⁷ James B. Ames "Novation" (supra).

⁵⁸ *McCluskey v. Prov. Wash. Ins. Co.*, 128 Mass. 306.

⁵⁹ *Citizen Fire Ins. Soc. & L. Co. v. Doll*, 35 Md. 89 and *Ellis v. Council Bluffs Ins. Co.*, 44 Ia. 671.

⁶⁰ *Ellis v. State Ins. Co.*, 63 Pa. 573; *Ins. Co. of N. A. v. Garland*, 108 Ill. 220.

⁶¹ *Ellis v. Ins. Co. of N. A.*, 22 Fed. 646. The three foregoing cases brought by plaintiff *Ellis* all arising out of the same fire offer the most instructive comparison in regard to the point in question.

"But it is said there is really no consideration for this contract on the part of the company; that the breach of the policy by the assignor forfeited all right to the unearned premium; and therefore the company received no consideration for any promise to insure for the unexpired term. The assignment of this policy is an assertion practically by the assignor of a right to an unearned premium, and the claim of such unearned premium, presented to the assignee, is assented to by the company when it consents to the assignment. It matters not that there may have been no actual right to such unearned premium, for the recognition and compromise of a claim is consideration. Further than that, there would be the injury to the assignee as well as the benefit to the insurer to be considered."

Let us suppose that the insurance company seeks to cancel the policy in the hands of the assignee, is then the assignment to be considered an admission by the company that the premium has been paid so as to obligate it to pay the unearned portion upon cancellation? Such is a possible interpretation of Mr. Justice Brewer's words. But no reason appears why the company admits anything more by the assignment than that the obligation to pay upon the occurrence of a loss has attached. It is submitted that the above quotation was not intended to mean more than this.

Where the principle that an assignment with consent of the insured constitutes a new contract is fully recognized, it would seem that the assignee could incur no liabilities for premiums due from the original insured. When he sues on the policy, therefore, such premiums would not be set off. Such is the case when an ordinary contract is transferred with the consent of the obligor,⁶² and the same rule would seem to be applied to insurance law.⁶³

Cancellation
by insolvency
of company.

While there are some contrary decisions, the weight of authority supports the proposition that on the judicial adjudication of the insolvency of a stock insurance company and the appointment of a receiver the outstanding policies of the company are *ipso facto* canceled, and that a claim for a loss thereafter occurring is not a provable claim against the company. (14 *Ruling Case Law*, p. 853, where the principal authorities are collected.)

⁶² *Lane v. Winthrop*, 1 Bay, 116 (S. C.), 1 Am. Dec. 599; *Merry v. Todd*, 12 Mass. 251; *Thompson v. Emery*, 27 N. H. 267; *King v. Fowler*, 16 Mass. 397; *Henry v. Brown*, 19 Johns. 40.

⁶³ *Phillips v. Merrimack Mut. Fire Ins. Co.*, 10 Cush. 350.

Finally on this branch of the subject it should be noted that the cancellation of the policy and return of the unearned premium, at the "request" of the insured, are mandatorily imposed upon the company by the Insurance Law (Ch. XXVIII of the Consol. Laws, sec. 122). An instructive case on what constitutes a "request" for cancellation by the insured is referred to in the footnote.⁶⁴

The company
must cancel
when requested
by insured.

II.

KNOWLEDGE AND AUTHORITY OF AGENTS AND BROKERS.

It is a general rule of the law of agency that an agent may not serve adverse interests. This principle has a very important bearing upon the numerous varieties of agent that intervene between the insurance company and its policy holders and is continuously demanding consideration in cases arising out of an exercise of the right of cancellation. While an intermediary between the two parties cannot be as to the same matter agent for both, at the same time he cannot be agent for neither. The parties must deal either personally or through their respective agents, never through strangers. Although an agent may not act for both parties in regard to the same matter, he may act for one party in regard to one matter and for the other in regard to a closely related one.

General

These simple propositions are involved when we consider the position of an insurance broker who, having secured insurance for a client, receives a notice from the company to cancel it. Although he was the agent of the insured to procure the insurance, he is ordinarily held not to be the insured's agent to receive a notice of cancellation.⁶⁵ It has been suggested⁶⁶ that his position is not that of an agent for the company, that he is a mere stranger and that the cancellation sought to be effected in this manner is invalid.

However, there is abundant reason and authority for the proposition that a broker may occupy such relations to an insur-

⁶⁴ *Boutwell v. Globe & Rutgers Fire Ins. Co.*, 193 N. Y. 323, 323, 117 App. Div. 994.

⁶⁵ *Hermann v. Hartford Fire Ins. Co.*, 100 N. Y. 411; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246; *Hartford Ins. Co. v. Tewes*, 122 Ill. App. 321; *American Fire Ins. Co. v. Brooks*, 83 Md. 251; *Gardner v. Standard Ins. Co.*, 88 Mo. App. 611; *White v. Connecticut Ins. Co.*, 120 Mass. 230; *Grace v. American Central Ins. Co.*, 109 U. S. 273; *Stevenson v. Sun Ins. Office (Cal. App.)* 119 Pac. 529; *Laboris v. Germania Fire Ins. Co.*, 27 La. Ann. 112; *Nat. Union Fire Co. v. Baltimore Asbestos Co.*, 80 Atl. 498; *Cheshire B. Co. v. Wilson*, 95 Atl. 26; *Kehler v. New Orleans Ins. Co.*, 23 Fed. 709.

⁶⁶ *Hartford Ins. v. Tewes* (supra).

ance company as to be its agent in many ways, including the receipt of premium moneys.⁶⁷

The custom of communicating notice of cancellation in this manner "doubtless had its origin in the desire of insurance agents to retain the goodwill of brokers with whom they had dealings. It is to the advantage of the broker to have the opportunity to substitute other insurance for a cancelled policy and thereby prevent the loss of his commissions or of the business of the assured his principal. There is no objection to the insurance agent favoring the broker by giving him the conduct of the cancellation, provided the agent does not thereby sacrifice the interests of his principal, the insurance company."⁶⁸

The agency of the broker for the company is necessarily a narrow one. The ordinary agent for an insurance company is liable to his principal for failure to promptly communicate notice of cancellation to the insured⁶⁹ and his prompt communication of such notice to an intervening broker will not relieve him.⁷⁰ A broker, however, fully discharges his duty in that regard and is relieved from liability by passing the notice on to the person from whom he received the application for insurance, even though such person be another broker and not the insured himself. His liability is defined as analogous to that of a gratuitous bailee; whether he would be liable to the company even if he took no steps at all to communicate the notice of cancellation to the insured is a matter of doubt. In the case of *Condon v. Exton-Hall Brokerage Agency*, Seabury, J., uses these words:

"Strictly speaking, no contractual relation existed between the plaintiff's assignors and the defendant, and in treating the defendant as if it occupied the position of a gratuitous bailee we view the case in the most favorable aspect to the plaintiff."⁷¹

Certain it is that this agency is limited strictly to the act of communicating notice of cancellation to the insured in behalf of the company. The agency is, moreover, unaffected by the cir-

67 *Smith Lumber Co. v. Colonial Assurance Co.*, 172 App. Div. 149, 151, and cases there cited.

68 *Sage J. in Franklin Ins. Co. v. Sears*, 21 Fed. 290.

69 *Washington F. & M. Ins. Co. v. Chebro*, 35 Fed. 477; *Phoenix Ins. Co. v. Pratt*, 38 Minn. 406, 21 N. W. 445; *Phoenix Ins. Co. v. Friesell*, 112 N. Y. 531; *British American Ins. Co. v. Wilson*, 27 Comp. 559; 60 Atl. 285; *Norwich Union Fire Ins. Soc. v. Dalton (Tex.)*, 137 S. W. 491; *Phoenix Ins. Co. v. A. B. Banks et al.*, 189 S. W. 228; 1 L. R. A. 1915 A 860; *Queen City F. Ins. Co. v. First Nat. Bk. (N. D.)*, 129 N. W. 545; 22 L. R. A. (N. S.) 510.

70 *Franklin Ins. Co. v. Sears*, 21 Fed. 290.

71 88 Misc. 130.

cumstance that the broker receives his pay by deducting it from the premiums before sending them to the company.⁷²

We have seen that the agency of the broker for the insured extends as a rule only to securing the insurance and not to receiving notice of cancellation in his behalf. He may, of course, be specially authorized to receive such notice. "If he possesses that power it arises from some actual or apparent authority superadded to the mere power to enter into the contract."⁷³ The facts which in various cases have been held to show such authority are not easy of analysis. Where the broker "had been the agent of the" insured "for about two years, through whom it procured insurance upon its property from various companies in all to the amount of \$10,000," and where it did not appear, "that he received any particular instructions as to the companies from which he was to receive insurance or as to the rates of premium or the amount to be insured by any particular company" it was held that such additional authority was inferable.⁷⁴

As generally in questions of agency, if prior acts of the same kind by the agent have been subsequently ratified by the principal, proof of this fact will afford strong evidence of agency. Thus if the broker has in the past received notice of cancellation which the insured has recognized as valid, it will be held that his authority to do so has continued.⁷⁵ If both parties acted with knowledge of a local custom whereby the broker was generally authorized to receive notice of cancellation, it would seem that such custom may be shown to prove the agency.⁷⁶ The contract between the insured and his broker being rarely, if ever, a written one, no question arises in these cases as to the variation of a written contract by parol evidence. On the other hand, if evidence of such a custom be introduced not to show the fact that the broker had authority to receive notice of cancellation for the insured but that generally irrespective of his agency it was customary for notice of cancellation to be given to the person procuring

When broker is agent for insured as to cancellation.

72 *Morris McGraw Woodware Company v. German Fire Insurance Company*, 126 La. 82; 38 L. R. A. N. S. 814.

73 *Andrews, J. in Hermann v. Ins. Co. (supra)*.

74 *Stone v. Franklin Fire Ins. Co.*, 105 N. Y. 542. Similar cases are *Rothchild v. American Central Fire Insurance Company*, 74 Mo. 417; *Edwards v. Home Insurance Co.*, 100 Mo. App. 686; *East Texas Fire Insurance Co. v. Blum*, 78 Tex. 653; *Beick v. Mechanics Ins. Co.*, 103 Mich. 75; *Dickert v. The Ins. Co.*, 22 S. C. 412.

75 *Snyder v. Commercial Union Ins. Co.*, 67 N. J. L. 7.

76 *Benedict v. Security Insurance Co.*, 147 App. Div. 819; *Norwich Union F. Ins. Soc. v. Dalton*, 125 S. W. 628.

the insurance the evidence will not be admitted.⁷⁷ Such a showing would be directly contrary to the express words of the policy that notice must be given to the insured and the admission of such evidence would be to vary the written contract by parol.

No different rule is involved in regard to the power of the broker to cancel in behalf of the insured than that in regard to his power to receive notice of cancellation from the company. If, as has been seen, a mere broker may not passively receive notice of cancellation, *a fortiori* he cannot cancel on his own initiative.⁷⁸ On the other hand, where the broker has such general agency as would allow him to receive notice of cancellation, it would seem that if he think best he may cancel on his own initiative and is "clothed with full authority to act for the plaintiff in procuring, modifying or cancelling the policy in question and his acts in respect to the policy are the same as if done by the plaintiff."⁷⁹ Certain clauses, before the Standard Policy was adopted, were sometimes put into a policy allowing notice of cancellation to be given to the person procuring the insurance. In such case notice to the broker was sufficient,⁸⁰ but by an overwhelming weight of authority the more common clause that anyone procuring the insurance should be held to be agent for the insured "in any transactions relating to this insurance" was held to apply only to transactions relating to the procurement of the insurance.⁸¹

From this general accord of authority the peculiar case of *Karelsen v. Sun Fire Office*,⁸² seems to dissent. In that case notice given to a broker by the insurance company and not communicated to the insured was held effective to cancel the policy. The case is rested rather indifferently upon any one of three grounds; that the clause in the policy similar to the one referred to made such notice effective; that the agent was a general agent, (concerning this point there is no evidence cited in the opinion that would seem to warrant such a conclusion); and lastly that although the agent did not have authority to cancel at the start,

The *Karelsen* case, 122 N. Y. 446. Notice of cancellation served on broker is sufficient if policy not delivered to insurer.

⁷⁷ *Grace v. American Central Insurance*, 100 U. S. 278; *Standard Oil Company v. Triumph Insurance Company*, 64 N. Y. 65; *Mutual Assurance Society v. Scottish Union and National*, 84 Va. 116.

⁷⁸ *American Fire Insurance Co. v. Minsker Realty Co.*, 83 Misc. (N. Y.) 1.

⁷⁹ *Standard Oil Co. v. Triumph Ins. Co.*, *supra*.

⁸⁰ *Lipman v. Niagara Fire Ins. Co.*, 121 N. Y. 454.

⁸¹ *American Fire Ins. Co. v. Brooks*, 83 Md. 22; *Grace v. Am. Cent. Ins. Co.* (*supra*); *Von Wein v. Scottish Union and National*, 20 J. & S. (N. Y.) 489; *White v. Conn. Fire Ins. Co.*, 120 Mass. 330; *Kehler v. New Orleans Insurance Co.*, 22 Fed. 708.

⁸² 122 N. Y. 446.

the fact that he had not delivered the policy to the insured gave him such authority. The *Hermann* case,⁸³ in the Court of Appeals of this state, holding that an agent to procure insurance is not necessarily one to cancel, is distinguished upon this last ground in these words:

"The *Hermann* case (100 N. Y. 411) is not applicable, for in that case, the policy had been delivered to the assured and the authority of the brokers was at an end. While here the brokers had not as yet obtained the policies and in the *Stone* case had not made delivery to the assured. Consequently their right as well as their duty to represent the plaintiffs in all matters necessary to accomplish that which they had undertaken, remained."

Suggestions to this effect are very common.⁸⁴ In another case in New York the *Hermann* case is again distinguished as follows:

"In that case the brokers had delivered the policy to the insured and there was a complete ending of their agency. Had this transaction been terminated by the delivery of the policy to the plaintiff then he alone would have possessed the power to return or to permit the cancellation of the policy. Their authority continued until they had placed the insurance for plaintiff. Whatever was necessary to bring about that result was within the compass of their power."⁸⁵

It would almost seem as if the learned judge here overlooked the fact that the brokers were agents for the insured to procure the insurance and as soon as the policy was given to them, the insurance was placed, and it would seem upon the principle of the *Hermann* case that then their agency ended. The rule, however, is repeatedly recognized in the authorities and even is supported by the weighty approval of Mr. Richards, who says:⁸⁶

"But on the other hand until the policy is delivered or so long as the contract rests upon a binding slip in charge of the broker, the broker may be served and he can also agree to cancellation instant in his discretion."

The general rule for which the *Hermann* case and *Grace*

⁸³ 100 N. Y. 411.

⁸⁴ *Hermann* case *supra*; *John R. Davis Lumber Co. v. Hartford Fire Ins. Co.*, 37 L. R. A. 121; *Rothschild v. American Central Ins. Co.*, 74 Mo. 41; *Fowler Cycle Works v. Western Ins. Co.*, 111 Ill. App. 631; *Walroth v. Hanover Fire Ins. Co.*, 119 App. Div. 407; *Hodge v. Security Ins. Co.*, 25 Hun. 583 at 588; *Ikellar v. Hartford Fire Ins. Co.*, 24 Misc. 138. If the broker hold the policy as mere bailor he will not have authority to cancel. *Cassville Roller Mill Co. v. Aerna Ins. Co.*, 79 S. W. 720; 105 Mo. App. 146.

⁸⁵ *Bettler v. Hartford Fire Ins. Co.*, 24 Misc. 138.

⁸⁶ *Richards on Insurance*, 3rd ed., p. 380.

case,⁸⁷ in the United States Supreme Court, are leading authorities, that a broker unless some superadded power be given him is not agent to cancel, is based in the words of Justice Truax in *Von Wein v. Scottish Union and National Ins. Co.*,⁸⁸ on the principle that

"An authority to make a contract for another does not carry with it by implication authority to cancel the contract," and that the ordinary broker's authority is limited to the procuring of the insurance. If the broker is actually the agent of the insured to procure the insurance his act in procuring it is as effective as if it were done by the insured himself. Moreover, a contract on a binding slip is complete and includes all the terms of the ordinary policy.⁸⁹ It cannot be said, therefore, that the mere retention of the policy postpones the closing of the contract. Such a conclusion would work a revolution in insurance law. The retention of the policy then instead of delaying the contract must operate upon the agency. The agent must have it in his power by retaining the policy to extend his own agency. Such a doctrine would seem as novel to the law of agency as its alternative would be novel to the law of insurance.

The doctrine set forth in the *Karelsen* case has been attacked in a very strong opinion of Shepard, J. in *Wilson v. Hartford Fire Insurance Co.*,⁹⁰ where referring to the *Grace* case he speaks as follows:

"In that case, it is true that the policy had passed into the actual possession of the insured before the notice of cancellation was given to the broker, who accepted the notice and promised the surrender of the policy; but we can not agree that this fact authorizes any limitation of the broad rule of the decision. It would be inconsistent with the general principles of the law of agency, applied by that decision, to hold, that because a policy is suffered to remain in the hands of the agent for its procurement he thereby becomes the general agent of the insured—for that would be the necessary effect—with power to alter, to rescind and to accept notice of cancellation and bind the insured without his knowledge or consent. To give such effect to the mere possession of the policy, after execution and delivery,

⁸⁷ 109 U. S. 278.

⁸⁸ 20 J. & S. 490.

⁸⁹ *Livmann v. Niagara Fire Ins. Co.* 121 N. Y. 451; *Karelsen v. Sun Fire Office*, 132 N. Y. 546; and as applied to an oral contract, *Hicks v. British American Ins. Co.*, 162 N. Y. 254.

⁹⁰ 17 App. Cas. D. C. 14.

See also *National Union Fire Ins. Co. v. Baltimore Asbestos Co.*, 89 Atl. 408; 122 Md. 121.

would be, not only to revive a limited agency, for no reasonable purpose, but also to extend it and invest it with powers that had not previously been given. Moreover, it would be fraught with great danger to the vast interests dependent upon insurance without any general compensatory benefit to any other interest.

Merely permitting the policies to remain for a time and uncalled for, in the hands of the brokers, which is all that this record discloses, is perfectly consistent with the idea of the termination of their agency.

"With the receipt of the policy a new relation is created between the insured and the broker, namely, that of depositor and depositary, the possession of the broker becomes, in law, the possession of the insured and nothing more; his sole duty and authority, in the new relation, is to deliver the policy upon demand of the insured or within a reasonable time without demand."

This opinion was, however, overruled on a different point in the Supreme Court of the United States in *Hartford Fire Insurance Co. v. Wilson*.⁹¹ As the ground of the reversal is likely to be confused with the question in the *Karelsen* case, it should be briefly noticed. A policy of insurance may be delivered to the brokers by the company conditionally upon the approval of the company, in which case the brokers being agents for the insured to procure the insurance bind their principal by the knowledge of the conditional delivery,⁹² and upon notice to them that the condition is not fulfilled, the policy which was never completely delivered never becomes effective. This rule which arises out of the complicated nature of an insurance policy, was not applied by the Court and lead to the reversal by the Supreme Court but the opinion was not criticised above on the point in hand. No question of conditional delivery arose in the *Karelsen* or similar cases.

Judge Shepard's opinion is supported by that of Circuit Judge Buffington in *Standard Leather Co. v. Northern Assurance Company of London*,⁹³ but this opinion also was overruled, this time in the Circuit Court of Appeals⁹⁴ and also upon a different point. Judge Gray's opinion in the Circuit Court of Appeals, however, contains the only explanation of the rule of law that has yet been found, as follows:

⁹¹ 187 U. S. 467.

⁹² *Young v. Newark Fire Ins. Co.*, 59 Conn. 41.

⁹³ 156 Fed. 688.

⁹⁴ 165 Fed. 600.

"Though not directly bearing upon the question of the scope of the agency in the case before us, it may be well to remark that under the situation so far as it was admittedly created by the plaintiffs the policies were left in the possession of Negley & Clark Company, while the general purpose of procuring the amount of insurance required was being transacted, and that no notice of cancellation from the defendant company directly to the plaintiffs would have been of as much advantage to the latter, as was the notice actually given to the brokers who were transacting the business and upon whom the duty devolved to procure other insurance in lieu of that covered."

This being an explanation from convenience not altogether satisfying in principle.

In a Michigan case,⁹⁵ the rule was justified on the ground that the insured by leaving the policies in the hands of the broker made a representation which estopped him to deny the agency. Under the facts of that case there is some ground for this holding, but it would seem untenable where the policy is retained only a very short time or as in the *Karelsen* case merely remains in binding slip.

Ratification of
unauthorized
act of agent.

It is a general rule of agency law that one may do an act in behalf of another which he was never authorized to do and yet the one in whose behalf that act was done may subsequently ratify the act and adopt it as his own. The ratification is said to relate back to the time of the act ratified.

There is no great difficulty in applying this rule to fire insurance contracts, so long as the ratification precedes a loss. Thus the act of an agent either in cancelling existing insurance or in procuring new, although in excess of his authority at the time of its execution, may be adopted and ratified.

Ratification
after loss.

Where ratification is attempted after loss, however, a question arises which is not satisfactorily settled by authority. Our first impression would be that there can be no ratification after loss because, first it would be equivalent to insurance after loss, and second, because it would be a grossly unmoral situation that would permit the insured to take a policy when he could collect upon it, although the company could not oblige him to take it before the loss occurred.

⁹⁵ *Koolstra v. Rockford Ins. Co.*, 122 Mich. 62.

It is frequently stated by text writers⁹⁶ and in dicta⁹⁷ that insurance taken out by an agent without authority may be ratified by the principal even after loss. Mr. Richards (3rd ed., p. 293, but see p. 296), however, states the rule as applicable to cases where the insurance is taken out by a warehouseman, bailee, auctioneer or the like, the property insured being described as "his own or held in trust or on commission" or by some similar phrase. The rule when applied to such cases has been explained by the theory that such fiduciary has authority by custom to insure the goods of his bailor⁹⁸ or by the remark that the money represents the goods and the owner of the goods is entitled to the money.⁹⁹ In such cases the insured has an interest in the property because of his possible liability over to the owner and although the measure of such interest is the full value of the property it would be unjust for him to retain it as his own. He is accordingly regarded as trustee thereof for the owner.

It is submitted, however, that the foregoing reasons can only apply where either such customary authority exists or where the person procuring the insurance stands in a fiduciary relation to the owner of the property. Even though he have an insurable interest in the property, if that interest is entirely distinct from that of the person for whom he procures the insurance he can only have procured the insurance as agent upon the other's interest. It can make no difference that the principal's name is not mentioned in the policy, the insurance being taken out "for whom it may concern." (See, however, Richards, 3rd ed., p. 296.) The test of the rule must be the nature of the interest held by him who procures the insurance.

The broader rule dependent specifically upon ratification goes back to certain English cases. *Lucena v. Craufurd*, the original authority,¹⁰⁰ was a marine case, insurance being effected "lost or not lost" but the decision does not seem to be based upon this circumstance. One of the judges who decided it, Lord Ellenborough, referred to it (in *Routh v. Thompson*, 13 East. 274 and *Hagedorn v. Oliverson*, 2 Maule & Sel. 485) as authority for the doctrine of ratification after loss. There was,

⁹⁶ *Clement Fire Ins.* 481; 1 *Wood Fire Ins.* p. 320, sec. 136; *Mechem Agency* 2nd ed., sec. 324.

⁹⁷ *Southern Cold Storage Co. v. Deckman*, 73 S. W. (Tex.) 543 *Warring v. Ins. Co.* 45 N. Y. 96; *Ferguson v. Pekin Plow Co.*, 141 Mo. 161.

⁹⁸ *Southern Cold Storage Co. v. Deckman*, 73 S. W. (Tex.) 543.

⁹⁹ *Selden J.* in *Stillwell v. Staples*, 39 N. Y. 401.

¹⁰⁰ 1 *Taunt.* 225.

however, some evidence of prior authorization and as the opinions of the judges are not reported it is not clear that it was not put in part, at least, upon the special power of the Crown to ratify the acts of its subjects. This latter point might have had also some influence in *Routh v. Thompson*, not, however, in the later case of *Hagedorn v. Olverson*. In all of these cases the action was brought by the party procuring the insurance although in *Lucena v. Craufurd*, it appears (5 Bos. & Pull, 269) that the plaintiffs had no insurable interest in themselves and in *Hagedorn v. Olverson* it is quite clear that the plaintiff's interest such as it was, was separate and distinct from that of the person for whom the insurance was effectuated. In view of the elaborate discussion of insurable interest in *Lucena v. Craufurd* (5 Bos. & Pull, 269) and the prior statute of 19 Geo. II the explanation suggested in *Norwich Ins. Co. v. Dalton*, *infra* that wagering policies were then valid seems erroneous.

In *Williams v. North China Ins. Co.*,¹⁰¹ Cockburn, C. J., says of the foregoing cases:

"The existing authorities certainly show that when an insurance is effected without authority by one person on another's behalf, the principal may ratify the insurance even after the loss is known. Mr. Benjamin asked us, as a Court of Appeal, to review those authorities. His contention was that there could only be a ratification when the principal could himself make the same contract as that ratified. Admitting that for general purposes this rule may be good, the authorities which we are asked to overrule are much too strong and of too long standing to be got over."

No case has been found specifically limiting the doctrine to marine insurance. This, it is submitted, would not be justifiable on the ground of the existence in that body of law of insurance "lost or not lost" because first, the circumstances of a principal ratifying an act of his agent with knowledge of the loss is quite different from that of taking out insurance when all parties interested are ignorant of the loss, and second, because a situation analogous to insurance "lost or not lost" may arise in fire insurance.¹⁰² It may, however, be suggested that the great number of interests that may exist in the subject matter of marine insurance makes the doctrine peculiarly applicable to that law.¹⁰³

¹⁰¹ 1 C. P. Div. 757.

¹⁰² *Gifford v. Queen Ins. Co.*, 1 Hanney (N. B.) 432; *Hallock v. Commercial Ins.*

Co. 27 N. J. L. 446.

¹⁰³ *Hooper v. Robinson*, 98 U. S. 523.

The case of *Finney v. Fairhaven Ins. Co.*,¹⁰⁴ is an American case which, like the foregoing, is inexplicable upon any other basis than that of ratification. The insured was the part owner of a ship and the policy taken out by another part owner read "for himself and other owners." The court began its opinion by observing that "it was long since determined that one part owner had no authority to insure for the rest of the owners although such part owner was also the ship's husband," and held that the insurance might be ratified by the insured after a loss.

The cases supporting the doctrine of ratification after loss are not, however, confined to marine insurance. In *Moris v. Cumberland Ins. Co.*,¹⁰⁵ the agent was the husband of his principal and the same doctrine was announced although it does not appear whether it was necessary to the decision. Other cases have been decided in which the agent had no interest whatever.¹⁰⁶

Mr. Frederick T. Case in an article in the *Green Bag*,¹⁰⁷ has attacked the doctrine. He looks upon it as effectuating a contract without any meeting of the minds and therefore erroneous and suggests its limitation to cases in which the person procuring the insurance has himself an insurable interest. In the opinion of the present writer such a rule is not narrow enough to be logical, nor broad enough to include the great body of authority. It is submitted also that his citation of *Stebbins v. Lancashire Ins. Co.*, 60 N. H. 65 as contrary to the doctrine of ratification after loss is erroneous as that case involved the right of an insurance agent to issue a policy for his company after a loss had occurred to his own knowledge. A suggestion has also been made that the doctrine be limited to cases where the premium has been actually paid,¹⁰⁸ and the whole doctrine has been recently repudiated in a careful opinion in *Texas*.¹⁰⁹ The argument on both sides has been well stated in *Finney v. Fairhaven*, *supra*, as follows:

¹⁰⁴ 5 Mete. 192; 38 Am. Dec. 397.

¹⁰⁵ 44 N. J. Eq. 478.

¹⁰⁶ *Boutwell v. Globe & Rutgers Fire Ins. Co.*, 183 N. Y. 323; *Todd v. German American Insurance Co.*, 2 Ga. App. 709; 39 S. E. 34; *Ferraz v. Western Assurance Co.*, 159 Pac. 809; *Wittenberger v. Beacon*, 3 Pa. St. 198, arising between agent and principal; *Marqusee v. Hartford Fire Ins. Co.*, 198 Fed. 476, reversed on rehearing on different point, 199 Fed. 1023; *Phoenix Ins. Co. v. Hancock*, 123 Cal. 222; *Bauer v. Firemen's Fund. Ins. Co.*, N. Y. L. J. Feb. 2, 1906.

¹⁰⁷ 19 *Green Bag*, 93.

¹⁰⁸ *Kline Bros. v. Royal Ins. Co.*, 192 Fed. 378.

¹⁰⁹ *Norwich Union Fire Ins. Co. v. Dalton*, 175 S. W. 459.

"It is argued that the part owners, on hearing of the safe arrival of the vessel may refuse to ratify the act of their co-tenant, and that in consequence of their refusal the underwriters will have no claim against them for their premium, while in case of loss, the owners can enforce the contract against the underwriters; and thus there is no mutuality in the case.

"This reasoning has been urged in previous cases, and though it is not without its force, yet the answer to it is, that the agent or part owner who effects the insurance is himself liable for the whole premium; because the whole property is at the risk of the underwriters, as the owners may at any time adopt the act, the policy being made for their benefit. And it may be also said that in making the contract, the insurers, having been willing to look to the part owner for their premium without calling for his authority cannot justly complain, if from any cause, the other owners, by disavowing the act, do not render themselves personally liable for the payment of the premium."

Also in *Marqusee v. Hartford Fire Ins. Co.* (supra) it was said

"What shocks us at first blush is that one may ratify an unauthorized contract after he knows that it is to his own advantage to do so and so bind the other party to his apparent disadvantage. Further reflection, however, causes this apparent unfairness to disappear. The other party, having agreed to be bound by this contract and not having withdrawn from it has no ground to complain if compelled to perform, the original lack of authority having been cured."

Substitution
and cancella-
tion a
single act.

For obvious reasons the question of the ratification by the insured of a cancellation of a policy in his behalf does not frequently arise except when coupled with a ratification of the simultaneous procurement of a new policy in a different company. The tendency of the courts seems to be to consider such a substitution as a single act, rather than two separate acts.

Ratification of
substitution.

Before examining this subject, which lies at the bottom of all the problems growing out of substitution of insurance, it is well to notice what is necessary to the ratification of the procurement of a policy. Where the broker told the insured of receiving a notice from the company, and that he had cancelled the policy and procured a new one and the insured then said "it didn't make any difference to him, just so he got his \$2,500 of insurance," the substitution was held to have been ratified.¹¹⁰ But in a case

¹¹⁰ *Larsen v. Thuringia American Ins. Co.* 208 Ill. 166.

where the broker represented to the insured that he was protected by substituted insurance, when in fact the substituted insurance was invalid, the assent of the insured given in reliance upon such representations was held not to amount to a ratification.¹¹¹

Ratification either of cancellation or of the procurement of a new policy need not be express, but, as is the case with an ordinary agency, may be inferred from the behaviour of the party. However, mere making of proof in both companies in the case of a substitution will not in any way bind the insured to any election and is commended as the proper and prudent practice.¹¹² Although receiving payment of the loss from the one company will apparently debar the insured from securing a second recovery from the other company¹¹³ nevertheless if the right against the second company be assigned by the insured to the company paying the loss, the question of their respective liabilities may be successfully tried.¹¹⁴

Double insur-
ance.

If the broker is authorized to secure insurance and that already obtained does not exhaust his authority, no reason is seen why in the absence of any provision against double insurance he may not procure more and if there be a fire while both are in force, why the insured may not recover *pro rata* upon both policies, just as if he himself procured both policies.¹¹⁵ If, however, the new insurance would bring the total beyond the amount for which the broker had authority to insure, authority to secure it would imply authority to cancel that already existing,¹¹⁶ or if the broker were agent of the cancelling company operate as a waiver of notice of cancellation.¹¹⁷

In such case the insured is not allowed to recover ratably upon both policies. It would seem, however, that where the broker is not agent for the cancelling company and the fire happens within five days of the notice to the broker, the insured ought to be allowed to recover upon both.

¹¹¹ *Yoshimi v. Fidelity Fire Ins. Co.* 89 App. Div. 69.

¹¹² *Snyder v. Commercial Union Ins. Co.* supra; *Martin v. Palatine Ins. Co.* 106 Tenn. 282; *Hartford Fire Ins. Co. v. Texas*, supra.

¹¹³ *Arnfeld v. Guardian Assurance Co.* 172 Pa. St. 606.

¹¹⁴ *Excelsior Fire Ins. Co. v. Royal Ins. Co. of Liverpool*, 55 N. Y. 343; *Snyder v. Commercial Union Ins. Co.* supra; see also in which suits were brought against both companies; *Warren v. Franklin Fire Ins. Co.* 145 N. W. 554; *Joyner & Long v. Scottish Fire Ins. Co.* 71 S. E. 434; 155 N. C. 554; *Wigal v. Georgia Home Ins. Co.* 147 S. W. 284; 148 Ky. 67; *Martin v. Palatine Ins. Co.* supra.

¹¹⁵ *Scheid v. German American Ins. Co.* 78 Atl. 507; 228 Pa. 44.

¹¹⁶ *White v. Ins. Co. of N. Y.*, 89 Fed. 161.

¹¹⁷ *Warren v. Franklin Fire Ins. Co.*, 143 N. W. 554; [La.]. What was said in this case on the question of double insurance seems to be beside the point. The policy sued upon was apparently issued by Johnson and not O'Hara.

Where the act of the agent in substituting insurance was originally unauthorized, it would seem that the insured ought to be able to ratify the procurement of the new policy but reject the cancellation of the old. No distinction appears on this point between the case where the broker is also agent for the cancelling company and where he is not. Such a partial ratification and a ratable recovery against both companies was allowed in a New York case.¹¹⁸ Other courts refuse the insured a recovery against both companies and hold that substitution is all one act and that "the ratification must be complete and of the whole transaction and the ratification of the contract for the substituted policy would necessarily carry with it a ratification of the cancellation of the old policy."¹¹⁹

Agent of company as agent for insured.

Up to this point we have been mainly concerned with brokers and their authority. We are now briefly to consider the extent to which the company's agent may be the agent of the insured.

The statement is frequently made that an agent for an insurance company may be agent also for the insured and have authority "to keep and care for," the policies, "with plenary power to keep the property insured in accordance with general directions of the insured and attend to all renewal, cancellation and replacement of insurance without consulting the assured in respects to particular policies or other details."¹²⁰ This is a hard doctrine and leads to much difficulty. Such a double agency is to be discouraged.¹²¹ Yet the validity of policies secured thereunder is established at least in Michigan¹²² and Minnesota.¹²³

Such general authority must be expressly conferred upon the insurance agent and before the fire. It seems to be generally held that ratification of a substitution of companies by a broker who is agent for both companies if made after the fire is in-

¹¹⁸ *National Condit. & Cble. Co. v. Commercial Union Assur. Co.*, 135 App. Div. 139, aff'd, 202 N. Y. 520.

¹¹⁹ *Snyder v. Commercial Union Assur. Co.*, supra; *White v. Assurance Co.*, 93 Fed. 61, 1st Cir. v. New Hampshire Fire Ins. Co. 70 S. E. 319; *Fitzley v. New Brunswick Fire Ins. Co.*, 126 Fed. 156.

¹²⁰ *Kerr v. Milwaukee Mech. Ins. Co.*, 117 Fed. 442; see *Johnson v. North Br. & Merc. Ins. Co.*, 63 N. E. 610; 66 Ohio St. 6.

¹²¹ "Reynolds by employing him in this double and anomalous capacity directly contributed to producing the complication. The whole arrangement whereby Kirchhofer procured the insurances by extra inducements to Reynolds in the way of sharing the commissions on premiums had a tendency to lessen his vigilance in guarding the company's interests and taking doubtful risks and the credit arrangements were in the same direction." *Campbell J. in Hartford Fire Ins. Co. v. Reynolds*, 38 Mich. 502 at 508.

¹²² *Dibble v. Northern Assurance Co. of London* 37 N. W. 704; 14 Am. St. Rep. 470; 70 Mich. 1.

¹²³ *Hamm Realty Co. v. N. H. Fire Ins. Co.*, 80 Minn. 139; 83 N. W. 41.

valid.¹²⁴ With this doctrine those jurisdictions which hold all ratification after a fire invalid have of course no quarrel.

It is submitted that the anomalous character of the relationship and the refusal of the courts to extend to it all the consequences of agency point to the incorrectness of the recognition of this double agency in any case. Where one goes to an agent for several insurance companies and asks for insurance, leaving the selection of the company to the agent, it has been affirmed¹²⁵ and denied¹²⁶ that a case of double agency arises. In such cases the validity of the insurance is generally sustained but it is believed that they are distinguished from the foregoing.

The examination of this branch of insurance law has been an interesting and valuable one to me, and I am thankful to the Society for the suggestion that I discuss it and the opportunity of presenting the foregoing for the consideration of the members. For whatever time may have been devoted to the preparation of this paper, I shall feel amply repaid if it prove of any help to those to whom cancellation and substitution are something more than abstractions.

The subject has not been presented perhaps in a popular form, but it hardly admits of that kind of treatment and, whatever may be the rule in medicine, enantiopathy and not homeopathy is the better practice when accurate treatment of a difficult and technical subject is desired.

In conclusion, I express my thanks to my associate, Mr. Henry T. Hall, for the painstaking research, without which this paper would not have been possible, and to Mr. W. J. Nichols of the North British & Mercantile, and Mr. W. N. Bament of the Home, for their helpful suggestions as to topics to be treated.

¹²⁴ *Siebbins v. Lancashire Co.*, 60 N. H. 65; *Massasoit Steam Mills v. Western Assurance Co.*, 122 Mass. 186; *Wilson v. N. H. Fire Assurance Co.*, 140 Mass. 210; *Hartford Fire Ins. Co. v. McKenzie*, 70 Ill. App. 615; *Commercial Union Assurance Co. v. Urtansky*, 113 Ky. 634, 24 Ky. Fed. Rep. 923; 80 S. W. 653; *Clark v. Ins. Co.*, 49 N. E. 297, 32 App. 1005; 35 L. R. A. 276; *Nabors v. Commercial Union Assn. Co.*, 51 So. 439; 123 La. 375; nothing has been found in the report of *Larsen v. Thuringia American Ins. Co.*, 226 Ill. 156, cited by Mr. Richards as contra the above doctrine) to show that the broker Bennett was also agent for the North Br. & Merc. Ins. Co., the substituted company in that case.

¹²⁵ *Norwich Union Fire Ins. Soc. v. Dalton (Tex.)*, 175 S. W. 469.

¹²⁶ *Br. Am. Assurance Co. v. Cooper*, 28 Pac. 582; *Mich. Pipe Co. v. Mich. Fire & Marine Ins. Co. (Mich.)*, 20 L. R. A. 271.

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